

ORIGINAL

HOGAN & HARTSON EX PARTE OR LATE FILED  
L.L.P.

RECEIVED

APR 30 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

COLUMBIA SQUARE  
555 THIRTEENTH STREET, NW  
WASHINGTON, DC 20004-1109  
TEL (202) 637-5600  
FAX (202) 637-5910  
WWW.HHLAW.COM

ORIGINAL

April 30, 2001

By Hand Delivery

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**Re: Petition of the State Independent Alliance and the  
Independent Telecommunications Group for a  
Declaratory Ruling that the Basic Universal Service  
Offering Provided by Western Wireless in Kansas is  
Subject to Regulation as Local Exchange Service,  
WT Docket No. 00-239**

***Ex Parte Submission***

Dear Ms. Salas:

Pursuant to the April 6, 2001 meeting between representatives of Western Wireless Corporation ("Western Wireless"), my colleague, Michele Farquhar, and Jim Schlichting, David Furth, Jeffrey Steinberg and Rose Crellin of the FCC Wireless Telecommunications Bureau, I hereby submit for the record in the above-referenced proceeding, a copy of the following:

- Filings and Decisions (dated December 27, 1999 through April 4, 2001)  
*Consol. Tel. Coop., Inc. v. Western Wireless Corp. and N. Dakota Pub. Serv. Comm'n*,  
Case No. 99-C-2486, Burleigh County, North Dakota District Court
- Filings and Decisions (dated January 15, 1999 through November 22, 2000)  
*Western Wireless Corp. v. Consol. Tel. Coop., Inc.*, Case No. PU-1564-99-17, N.  
Dakota Pub. Serv. Comm'n

In its March 30, 2001 decision, the Burleigh County, North Dakota District Court affirmed the North Dakota Public Service Commission's findings of fact that: (1) Western Wireless' basic universal service ("BUS") offering has mobile capabilities and is therefore a mobile

No. of Copies rec'd 01  
List A B C D E

BRUSSELS LONDON PARIS\* BUDAPEST\* PRAGUE\* WARSAW MOSCOW TOKYO

NEW YORK BALTIMORE McLEAN MIAMI DENVER BOULDER COLORADO SPRINGS LOS ANGELES

Magalie Roman Salas

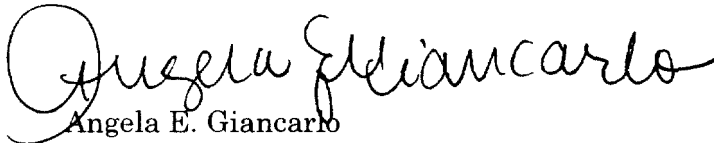
April 30, 2001

Page Two

service; (2) as a mobile service, Western Wireless' BUS is exempt from state entry regulations; (3) North Dakota is federally preempted from rate and entry regulation of Western Wireless' BUS as provided in Section 332(c)(3)(A) of the Communications Act; and (4) any requirement for a Certificate of Public Convenience and Necessity under North Dakota state law is federally preempted.

Pursuant to Section 1.1206(b)(1) of the Commission's rules, one original (with attachments) and one copy (with attachments) of this letter are being filed with your office. In addition, I am sending one copy of this notice to the FCC staff listed below. Please contact me with any additional questions.

Respectfully submitted,

A handwritten signature in black ink, reading "Angela E. Giancarlo". The signature is fluid and cursive, with a large initial "A".

Angela E. Giancarlo  
Counsel for Western Wireless Corporation

cc:           Rose Crellin (with attachments)  
              David Furth  
              James Schlichting  
              Jeff Steinberg

## **Section 1**

### **Court Filings and Decisions**

### **Burleigh County District Court, North Dakota**

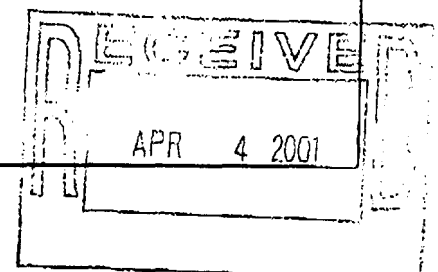
*organized in reverse chronological order  
(December 27, 1999 – April 4, 2001)*

**STATE OF NORTH DAKOTA****IN DISTRICT COURT****COUNTY OF BURLEIGH****Case No. 99-C-2486****Consolidated Telephone Cooperative****Appellant,****vs.****Western Wireless Corporation and  
North Dakota Public Service  
Commission,****Appellees.****Opinion and Order**

This is an appeal from a decision of the Public Service Commission, Case No. PU-1564-99-17, in which the Public Service Commission held it was federally preempted from requiring Western Wireless Corporation to obtain a certificate of public convenience and necessity for its wireless residential service in Regent, North Dakota.

Western Wireless Corporation (Western Wireless), which is also known as Cellular One, provides mobile cellular telephone service in North Dakota under licenses from the Federal Communications Commission.

Consolidated Telephone Cooperative (Consolidated) provides landline local exchange telecommunications service in a number of local exchange areas in counties located in southwestern North Dakota, under certificates of public convenience and necessity issued by the North Dakota Public Service Commission (PSC) under the provisions of Chapter 49-03.1 of the North Dakota Century Code. Regent is one of the communities served by Consolidated.



On August 21, 1998, Western Wireless submitted an access service request to Consolidated for 2000 direct inward dialed numbers and a local T-1 circuit with six trunks at Regent. Consolidated had previously provided similar service to Western Wireless for its cell site located in Consolidated's Bowman exchange for use by Western Wireless cellular mobile customers. The service requested was installed and turned up for service on September 18, 1999.

On January 7, 1999, Western Wireless initiated a wireless residential service (WRS), a wireless local loop offering which competed with local services offered by Consolidated in Regent. The services were made possible by Western Wireless's purchase from Consolidated of a local DID trunk to route calls from Consolidated's customers to Western Wireless's customers, along with Consolidated's assignment to Western Wireless of 2000 local telephone numbers.

On January 11, 1999, Consolidated disconnected service to Western Wireless. Western Wireless complained to the PSC, requesting that re-connection be ordered and that penalties and fines be assessed against Consolidated. On February 1, 1999, Consolidated reconnected the service. Consolidated, however, counterclaimed asserting Western Wireless had engaged in competitive local exchange carrier activities without proper authority. On August 31, 1999, the PSC entered Findings of Fact, Conclusions of Law, and an Order. On appeal to the district court, Consolidated challenged the following findings and conclusions:

**(1) Finding of Fact No. 38:**

The Commission finds WRS has mobile capabilities and it therefore is a mobile service.

**(2) Finding of Fact No. 39:**

As a mobile service, WRS is exempt from state entry regulations.

**(3) Conclusion of Law No. 3:**

North Dakota is federally preempted from rate and entry regulation of Western's Wireless Residential Service as provided in 47 USC §332 (c)(3)(A).

**(4) Conclusion of Law No. 4:**

Any requirement for a Certificate of Public Convenience and Necessity under NDCC Chapter 49-03.1 is federally preempted.

After initial briefs were filed, Consolidated sought to reopen the record so the PSC could review additional evidence. The district court remanded the case to the PSC to reconsider. The PSC considered the evidence and heard additional testimony. By order dated November 22, 2000, the PSC determined the new evidence was not persuasive. The PSC reaffirmed its earlier order.

**Standard of Review**

The North Dakota Supreme Court has considered the standard of review of administrative decisions in a number of cases.

In *Knudson v. Director, North Dakota Dept. of Transp.*, 530 N.W.2d 313, 316 (N.D. 1995), the Court held:

Our review of the findings of an administrative agency is limited to whether the findings of fact are supported by a preponderance of the admissible evidence. *Peterson v. N.D. Dept. of Transp.*, 518 N.W.2d 690 (N.D. 1994). "We determine only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." *Bryl v. Backes*, 477 N.W.2d 809, 811 (N.D. 1991).

In *Southeast Human Service Center, Dept. of Human Services v. Elseman*, 525 N.W.2d 664, 669 (N.D. 1994), the North Dakota Supreme Court held:

Sections 28-32-21 and 28-32-19, N.D.C.C., outline this court's standard for reviewing an appeal from an administrative agency decision.

**Berger, supra; Berdahl, supra.** Under those provisions, our review involves a three-step process to determine whether the agency's findings of fact are supported by a preponderance of the evidence, its conclusions of law are supported by its findings of fact, and its decision is in accordance with the law. **Bohac v. Graham**, 424 N.W.2d 144 (N.D.1988). In reviewing an administrative agency's findings of fact, we do not make independent findings or substitute our judgment for that of the agency; instead, we determine whether a reasoning mind could have reasonably determined that the agency's factual conclusions were supported by the weight of the evidence. **Berdahl, supra.**

In **Singha v. ND State Board of Medical Examiners**, 1998 ND 42 ¶ 14, 574

N.W.2d 838, the North Dakota Supreme Court held:

Our review of the factual basis for the Board's decision involves a three-step process to decide whether its findings of fact are supported by a preponderance of the evidence, its conclusions of law are supported by its findings of fact, and its decision is in accordance with the law and is supported by its conclusions of law. **Briggs**, 448 N.W.2d at 610. In applying the preponderance-of-evidence standard, we do not make independent findings of fact or substitute our judgment for that of the Board; rather, we decide only whether a reasoning mind reasonably could have decided the Board's factual conclusions were proved by the weight of the evidence from the entire record. *Id.* See **Power Fuels, Inc. v. Elkin**, 283 N.W.2d 214, 220 (N.D. 1979). It is not our function to act as a super board when reviewing decisions by an administrative agency. **Skjefte v. Job Serv. N.D.**, 392 N.W.2d 815, 817 (N.D. 1986). In technical matters involving agency expertise, we have acknowledged the agency decision is entitled to appreciable deference. **Montana-Dakota Util. Co. v. Public Serv. Comm'n**, 413 N.W.2d 308, 312 (N.D. 1987).

#### ISSUE

Consolidated builds its entire argument in this case around a challenge of the PSC's findings that WRS is a mobile service. Consolidated concedes that if WRS service Wireless is offering in Regent is a commercial mobile service, as defined by federal law, entry regulation by the PSC is prohibited by 47 U.S.C. § 332(c)(3)(A). Consolidated argues because the service is not provided with equipment which is

both capable of operating while moving and which ordinarily does move, WRS is not a mobile service. 47 U.S.C. § 153 (28) Wireless argues the service is a mobile service because it is provided with dual-use equipment which is capable of transmitting while moving. 47 C.F.R. § 22.99 (2000)

The specific findings of the PSC which are challenged are findings that WRS has mobile capabilities and is therefore a mobile service. The PSC has, in effect, made a finding that the service is a mobile service because it is provided with equipment which is capable of transmitting while moving.

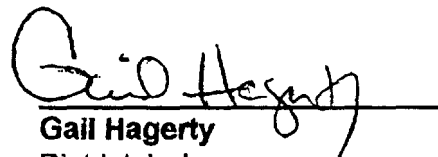
The PSC made its findings after considering definitions and requirements of federal law. Their careful review of these matters is reflected in the findings preceding Findings 38 and 39, which are challenged. Findings 38 and 39 are supported by the record. The findings satisfies the federal directives for determining a service is a commercial service. The record supports the findings and the findings support the conclusion a the requirement for a Certificate of Public Convenience and Necessity under NDCC Chapter 49-03.1 is preempted by federal law.

#### CONCLUSION

The findings of fact, conclusions of law, and orders of the PSC in this matter are **AFFIRMED**.

Dated March 30, 2001.

BY THE COURT:

  
Gail Hagerty  
District Judge



# Kelsch Kelsch Ruff & Kranda

C.F. Kelsch  
1890-1987

Attorneys at Law  
Mandan, North Dakota

WILLIAM C. KELSCH  
THOMAS F. KELSCH, P.C.  
ARLEN M. RUFF, P.C.  
THOMAS D. KELSCH, P.C.  
TODD D. KRANDA, P.C.\*  
TIMOTHY J. WAHLIN, P.C.  
ROB FORWARD, P.C.  
WILLIAM J. DELMORE

\*CLA Member

103 Collins Avenue  
P.O. Box 1266  
Mandan, ND 58554-7266  
Phone (701) 663-9818  
1-888-663-9818  
Fax (701) 663-9810  
E-Mail [kelsch@midco.net](mailto:kelsch@midco.net)  
Website [www.kelsch.com](http://www.kelsch.com)

\*Also Licensed in Minnesota

January 18, 2001

## HAND DELIVERED

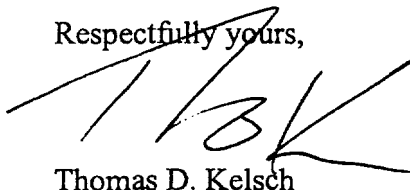
BURLEIGH COUNTY DISTRICT COURT  
PO BOX 1055  
BISMARCK ND 58502-1055

RE: Consolidated Telephone Cooperative v. Western Wireless Corporation, and North Dakota  
Public Service Commission  
Appeal No. 08-99-C-2486/001  
Our File No. 8451

Dear Clerk:

Enclosed for filing is the Supplemental Brief of Appellee Western Wireless Corporation. Thank you for your attention to this matter.

Respectfully yours,



Thomas D. Kelsch

ve  
Enc

c: Western Wireless Corporation  
Mark J Ayotte, Esq.  
Michael J Maus, Esq.  
William W Binek, Esq.

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

Consolidated Telephone Cooperative, )  
 )  
Appellant, )  
 )  
vs. )  
 )  
Western Wireless Corporation and )  
North Dakota Public Service Commission, )  
 )  
Appellees. )

Case No. 08-99-C-02486/001

**SUPPLEMENTAL BRIEF OF APPELLEE**  
**WESTERN WIRELESS CORPORATION**

## **TABLE OF CONTENTS**

|   |    |
|---|----|
| INTRODUCTION .....  | 1  |
| SUMMARY OF PROCEEDINGS .....  | 1  |
| ARGUMENT .....  | 2  |
| I. CONSOLIDATED FAILS TO MEET ITS BURDEN UNDER THE<br>PROPER STANDARD OF REVIEW .....                         | 3  |
| II. THE PSC PROPERLY CONSIDERED THE ADDITIONAL EVIDENCE<br>AND REAFFIRMED ITS DECISION THAT WRS IS CMRS ..... | 5  |
| III. CONSOLIDATED MISSTATES THE EXISTING REGULATORY<br>TREATMENT OF CELLULAR SERVICE .....                    | 7  |
| A. It is Undisputed that WRS Meets the FCC's Definition of CMRS .....   | 9  |
| B. FCC Regulation of Solely Fixed Services .....  | 11 |
| CONCLUSION .....  | 13 |

## **TABLE OF AUTHORITIES**

### **CASES**

|   |      |
|---|------|
| <i>Elizabeth Blackwell Health Ctr. For Women v. Knoll</i> ,<br>61 F.3d 170 (3d Cir. 1995).....          | 9    |
| <i>Aggie Invs. v. North Dakota Public Serv. Commn</i> ,<br>470 N.W.2d 805 (N.D. 1991) .....             | 3    |
| <i>Northern States Power Co. v. North Dakota Pub. Serv. Commn</i> ,<br>452 N.W.2d 340 (N.D. 1990) ..... | 4, 5 |
| <i>Powers v. State of N.D. Job Serv.</i> ,<br>1999 ND 162, 598 N.W.2d 817 (N.D. 1999) .....             | 3    |
| <i>Vetter v. North Dakota Workers Compensation Bureau</i> ,<br>554 N.W.2d 451 (N.D. 1996) .....         | 7    |

### **STATUTES AND RULES**

|                                     |                 |
|-------------------------------------|-----------------|
| 28 U.S.C. § 2342(1) .....           | 9               |
| 47 C.F.R. § 22.99 .....             | 8               |
| 47 U.S.C. § 153(28) .....           | 8               |
| 47 U.S.C. § 332(c)(3)(A) .....      | 2, 8, 9, 10, 13 |
| N.D. Cent. Code § 28-32-15(4) ..... | 7               |
| N.D. Cent. Code § 28-32-19 .....    | 3               |

### **OTHER AUTHORITIES**

|  |           |
|--|-----------|
| <i>Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services</i> , WT Docket No. 96-6, FCC 96-283, <i>First Report and Order and Further Notice of Proposed Rule Making</i> (rel. Aug. 1, 1996) .....   | 11        |
| <i>PSCs Order on Remand, Appellants January 2001 Brief</i> at p. 10 (discussing <i>In the Matter of Amendment of the Commissions Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services</i> , WT docket No. 96-6, Second Report and Order and Order on Reconsideration, FCC 00-246 (July 20, 2000) ..... | 8, 10, 12 |
| <i>In the Matter of Implementation of Sections 3(N) and 3323 of the Communications Act Regulatory Treatment of Mobile Service</i> , GN Docket No. 93-252, Second Report and Order (rel. March 7, 1994) .....   | 8, 9, 11  |

## **INTRODUCTION**

Western Wireless Corporation (“Western Wireless”) submits this brief to supplement its brief filed on February 3, 2000. After considering additional evidence at the direction of the Court, the North Dakota Public Service Commission (“PSC”) issued an order reaffirming that Western Wireless is not required to obtain a certificate of public convenience and necessity (“CPCN”) from the PSC in order to provide its wireless residential service (“WRS”) offering. For the reasons set forth in Western Wireless’ initial brief and herein, the Court should affirm the PSC’s determination that WRS is a commercial mobile radio service (“CMRS”), and as such the state is preempted from requiring a CPCN. Appellant Consolidated Telephone Cooperative (“Consolidated”) misstates the facts, is wrong on the law, and its appeal should be denied.

## **SUMMARY OF PROCEEDINGS**<sup>1</sup>

In January 1999, Western Wireless began providing WRS as a market trial in Regent, North Dakota. Shortly thereafter, Consolidated, the incumbent telephone company in Regent, unilaterally disconnected interconnection service between the companies, thereby terminating Western Wireless’ customers’ connection to the public switched telephone network, including access to emergency 911 services. Consolidated claimed it took this self-help action because it asserts WRS can be provided by Western Wireless only under the authority of a CPCN. Since that time, Consolidated reconnected the interconnection service, the PSC fined Consolidated for its action, and Western Wireless has pursued remedies in another forum for Consolidated’s anticompetitive conduct.<sup>2</sup> In addition, the PSC held a hearing on Consolidated’s counterclaim

---

<sup>1</sup> A more detailed summary of the background facts and proceedings before the PSC is contained in Western Wireless’ February 3, 2000 brief. In this brief, Western Wireless will cite to the March 1999 transcript as “Tr.” and the September 2000 transcript as “Tr. 2.”

<sup>2</sup> Western Wireless was granted summary judgment on its federal anti-trust complaint against Consolidated. Tr. 2 at page 26.

that alleged WRS is subject to state entry requirements, e.g., a CPCN. The PSC made findings of fact and conclusions of law that WRS is a commercial mobile radio service under 47 U.S.C. § 332(c)(3)(A), and as such, state entry requirements are preempted by federal law.<sup>3</sup> Consolidated appealed, challenging certain identified findings of fact and conclusions of law.

After initial briefs were filed, Consolidated sought to reopen the record so the PSC could review additional evidence consisting of an Equipment Agreement and a Service Agreement in place between Western Wireless and its WRS customers before February 1999 (the “Service Agreements”). This Court remanded the case to the PSC to reconsider its *Order* in light of this additional evidence. The PSC considered the evidence, and heard testimony from Western Wireless as to the meaning of the Service Agreements and the subsequent amendments of the Service Agreements. By order dated November 22, 2000, the PSC determined the new evidence was not persuasive, and did not cause it to alter its prior determination that WRS is CMRS outside the scope of PSC regulation.<sup>4</sup> The PSC thus reaffirmed its *Order*. Consolidated did not appeal the findings of fact and conclusions of law contained in the *Order on Remand*. This matter is now back before the Court on Consolidated’s appeal of the PSC’s *Order*.

### **ARGUMENT**

This supplemental brief responds to Consolidated’s brief following the PSC’s *Order on Remand*. Western Wireless incorporates its initial brief filed on February 3, 2000, and will not restate the arguments made therein. On remand, the PSC considered evidence offered by Consolidated, and rebuttal evidence of Western Wireless. Consistent with its *Order*, the PSC

---

<sup>3</sup> *Western Wireless Corp. v. Consolidated Tel. Coop., Inc.*, No. PV-1564-99-17, Findings of Fact, Conclusions of Law and Order (August 31, 1999) (“*Order*”).

<sup>4</sup> *Western Wireless Corp. v. Consolidated Tel. Coop., Inc.*, No. PV-1564-99-17, Findings of Fact, Conclusions of Law and Order on Remand, p. 3 (November 22, 2000) (“*Order on Remand*”).

found the new evidence did not change the technical capabilities of the service, and so did not impact the regulatory status of WRS as CMRS.<sup>5</sup>

Now on appeal, Consolidated ignores the fact that the PSC rejected Consolidated's evidence on remand, and disregards all standards of review that apply to this Court's evaluation of this case. By rearguing the facts in the first instance as if this were not an appeal, and asking the Court to make and rely on independent findings of fact, Consolidated fails to meet its burden to set aside the challenged findings of fact. On issues of law, Consolidated fails to even address the legal basis for the PSC's *Order* and *Order on Remand*, and misstates the regulatory structure of cellular services. When the law is correctly applied to PSC's proper findings of fact, it is clear that the PSC's *Order* and *Order on Remand* should be affirmed.

#### **I. CONSOLIDATED FAILS TO MEET ITS BURDEN UNDER THE PROPER STANDARD OF REVIEW**

The standard of review for this appeal is provided by N.D. Cent. Code § 28-32-19. The standard requires the Court to affirm the PSC's decision if: (i) a reasoning mind could have reasonably determined that the PSC's factual conclusions were supported by the weight of the evidence; (ii) the PSC's conclusions of law are sustained by the findings of fact; and (iii) the PSC's ultimate decision is supported by the conclusions of law.<sup>6</sup> Although Consolidated challenges Finding of Fact No. 38 in the PSC's *Order* that WRS has "mobile capabilities and is therefore a mobile service,"<sup>7</sup> it fails to argue the evidence in accordance with the proper standard of review. Because Consolidated has failed to meet its high burden for overturning this PSC finding of fact, its appeal should be dismissed.

---

<sup>5</sup> *Order on Remand* at p. 3.

<sup>6</sup> *Aggie Invs. v. North Dakota Public Serv. Comm'n*, 470 N.W.2d 805, 813 (N.D. 1991); *Powers v. State of N.D. Job Serv.*, 1999 ND 162, ¶ 4, 598 N.W.2d 817, 818 (N.D. 1999).

<sup>7</sup> *Appellant's January 2001 Brief* at p. 4.

Consolidated also challenges the PSC's finding that WRS is a mobile service by relying on numerous assertions of "fact" that were not made as findings of fact by the PSC, are not supported by record cites, and are disputed by Western Wireless. For example, Consolidated alleges that the WRS unit is "designed to be hung on the wall,"<sup>8</sup> is "not designed or intended to be used in mobile services,"<sup>9</sup> and "is neither intended to be moved nor is it 'ordinarily moved.'"<sup>10</sup> Such findings were not made by the PSC, and it is not this Court's role to make independent findings of fact.<sup>11</sup> Consolidated simply ignores the PSC's findings – and the deference to which they are entitled – and tries to reargue its own characterization of the evidence to this Court.

The liberties Consolidated's takes with the rules of appellate procedure are highlighted in its primary argument that:

It takes no more than common sense and every day knowledge to understand that "ordinary" users with a need for mobile communications will not carry with them a box the size of a laptop computer . . . .<sup>12</sup>

Not surprisingly, Consolidated cites no case in which a reviewing court rejected an agency's fact finding based on "every day knowledge." Instead, the Legislature has made the PSC the presumptive finder of fact, subject to reversal only if the agency decision represented an unreasonable analysis of the record evidence. Consolidated's argument based on "common

---

<sup>8</sup> *Appellant's January 2001 Brief* at p. 4.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 5.

<sup>11</sup> *Northern States Power Co. v. North Dakota Pub. Serv. Comm'n*, 452 N.W.2d 340, 343 (N.D. 1990).

<sup>12</sup> *Appellant's January 2001 Brief* at p. 8.



sense” and “every day knowledge” fails to meet this standard.<sup>13</sup> Consolidated makes no attempt to meet its burden to show the PSC’s Finding of Fact 38 is not reasonably supported by the weight of the evidence, and as a result it clearly fails to do so. Because Consolidated fails to meet its burden for this Court to overturn the PSC’s fact finding that WRS has mobile capabilities and is therefore a mobile service, its appeal of Finding of Fact 38 must be denied.

## **II. THE PSC PROPERLY CONSIDERED THE ADDITIONAL EVIDENCE AND REAFFIRMED ITS DECISION THAT WRS IS CMRS**

Consolidated sought remand so the PSC could consider a term in the WRS Service Agreements that addressed a customer’s movement of the WRS unit. Tr. 2 at pages 18-19. Consolidated argued the existence of this term showed that Western Wireless intended the units to remain stationary, and that as a result WRS could not be a “mobile service” under federal law. Tr. 2 at page 63. Western Wireless offered rebuttal testimony of RaeAnn Kelsch, Manager of External Relations at Western Wireless. Tr. 2 at page 33. Ms. Kelsch testified the term was added by the sales and marketing group of Western Wireless out of concern for signal quality issues, not to describe or limit the mobile capabilities of the service. Tr. 2 at pages 37-38. She also explained the language was later deleted from the Service Agreements to leave no question as to the customer’s right to move the unit. Tr. 2 at page 37. Western Wireless did not enforce the term or attempt to preclude customers from moving the units, and no similar term exists in the agreements in place with the company’s 1,500 WRS customers in four other states. Tr. 2 at pages 38-39. This was consistent with Western Wireless’ testimony at the initial hearing that the

---

<sup>13</sup> In addition, common sense cuts both ways. Consolidated’s “common sense” position is that the WRS unit cannot be “mobile” because it is the size of a laptop computer. The millions of Americans who use laptop computers in coffee shops, libraries, and airports would likely disagree based on common sense and every day knowledge. It is precisely for this reason that factual determinations like the one in this case are made based on *evidence* by an agency with subject matter *expertise*, subject to deferential review. See *Northern States Power Co.*, 452 N.W.2d at 343 (“We will not substitute our judgment for that of the qualified experts in the administrative agencies.”).

WRS unit could be moved, and that mobility was a significant benefit of the service. Tr. at page 30.

In its *Order on Remand* the PSC rejected any significance attributed to the Service Agreements because contract terms could not change the regulatory treatment of WRS:

Service agreement language does not create, eliminate or revise the technical capabilities of the residential wireless service provided by Western Wireless.<sup>14</sup>

The PSC further found that the “prohibiting language was removed from service agreements effective February 2000 and at that time existing customers entered into an addendum to each agreement which removed the prohibitive language from their service agreements.”<sup>15</sup> The PSC thus relied on the capabilities of the unit rather than Service Agreement language, which is consistent with its earlier *Order*, and as discussed below, is the correct application of governing federal law.

The PSC correctly did not make any findings about Western Wireless’ intent with regard to WRS units,<sup>16</sup> so Consolidated’s many assertions of “fact” relating to Western Wireless’ intent must be disregarded on this appeal. For example, Consolidated claims that the identified language in the Service Agreements compels a finding that Western Wireless intended the WRS unit to remain stationary, and a conclusion that the WRS units did not “ordinarily move.”<sup>17</sup> As discussed above, however, at both the initial hearing and the hearing on remand, Western Wireless’ witnesses testified that the company fully expected that WRS units would be moved. The PSC, however, did not need to resolve these factual disputes to make conclusions of law, as

---

<sup>14</sup> *Order on Remand* at p. 3, ¶ 5.

<sup>15</sup> *Order on Remand* at p. 2, ¶ 2.

<sup>16</sup> *Order on Remand* at p. 3.

<sup>17</sup> *Appellant’s January 2001 Brief* at pp. 11-12.

it relied on findings that the technical capabilities of WRS result in the service being mobile. Consolidated's reliance on its version of these disputed facts is thus improper on appeal.<sup>18</sup>

Finally, Consolidated failed to appeal the PSC's *Order on Remand*, and has filed no specifications of error as to the *Order on Remand*. Consolidated is thus legally precluded from challenging the PSC's findings and conclusions as to the additional evidence considered on remand.<sup>19</sup> The Court must reject all of Consolidated's claims that Western Wireless intended the WRS units to remain stationary.

In sum, Consolidated seeks to have this Court make findings that were refuted by Western Wireless, were not adopted by the PSC and from which Consolidated did not appeal. The Court should not allow Consolidated to subvert the rules of appellate review and should not make independent findings. Accordingly, Consolidated fails to meet its burden to challenge the PSC's consideration and rejection of the new evidence offered on remand, and this Court should ignore Consolidated's characterization of and speculation regarding this evidence.

### **III. CONSOLIDATED MISSTATES THE EXISTING REGULATORY TREATMENT OF CELLULAR SERVICE**

Throughout this proceeding Consolidated has demonstrated its fundamental misunderstanding of the way in which cellular services are regulated. In its brief following remand Consolidated jumbles these issues further by arguing that a recent Federal Communications Commission ("FCC") order relating to the regulation of solely fixed wireless

---

<sup>18</sup> Consolidated goes even farther afield in assigning motives to Western Wireless for which there is no record support whatsoever. Consolidated claims Western Wireless wanted the WRS units to remain stationary to keep customers from abandoning conventional cellular service and to facilitate repossession of the unit in case of customer default. *Appellant's January 2001 Brief* at p. 12. Not only were such findings not made by the PSC, there is not even a cite to any record evidence. This Court should decline to make independent findings of fact, especially based on nothing more than the speculation of the appellant.

<sup>19</sup> See N.D. Cent. Code § 28-32-15(4); *Vetter v. North Dakota Workers Compensation Bureau*, 554 N.W.2d 451, 454 (N.D. 1996).

services should have affected the PSC's *Order on Remand*.<sup>20</sup> When the proper analysis is performed, it is clear the PSC's *Order* and *Order on Remand* are fully consistent with the federal regulation of cellular service, and the recent *CMRS Flexibility Second Report and Order* is not determinative of issues presented in this case. To assist the presentation of this analysis, Figure A (below) is a "decision tree" that shows the steps to be followed for determining how WRS is regulated under federal law.

#### FIGURE A

1. Does WRS meet either of the following definitions:
  - a. Provided with equipment that is capable of operating while moving and ordinarily does move;<sup>a</sup> or
  - b. Provided with dual-use equipment which is capable of transmitting while moving.<sup>b</sup>

If WRS meets either definition, the service is CMRS over which the PSC has no entry jurisdiction under 47 U.S.C. § 332(c)(3)(A).  
 If not, go to question 2. [Since the PSC concluded that WRS meets definition (b), the legal analysis should end here.]
2. Is WRS a solely fixed wireless service that is "auxiliary" or "ancillary" to its mobile service offerings?  
 If so, it is regulated as CMRS, and the PSC has no entry jurisdiction under 37 U.S.C. § 332 (c)(3)(A).<sup>c</sup>  
 If not, go to question 3.
3. If WRS is neither a mobile service nor a fixed service that is ancillary to other mobile service offerings, it must be a solely fixed service offered on a co-primary basis with Western Wireless' mobile service. In this case an interested party may petition the FCC for a determination of the regulatory status of the offering.<sup>d</sup>

<sup>a</sup> See 47 U.S.C. § 153(28).

<sup>b</sup> See 47 C.F.R. § 22.99 (2000); *In the Matter of Implementation of Sections 3(N) and 3323 of the Communications Act Regulatory Treatment of Mobile Service*, GN Docket No. 93-252, Second Report and Order, ¶ 38 (rel. March 7, 1994) ("*CMRS Second Report and Order*") (quoted by *Order* at p. 11, ¶ 35).

<sup>c</sup> *CMRS Second Report and Order* at ¶ 36.

<sup>d</sup> *CMRS Flexibility Second Report and Order* at ¶ 8.

<sup>20</sup> *Appellant's January 2001 Brief* at p. 10 (discussing *In the Matter of Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT docket No. 96-6, Second Report and Order and Order on Reconsideration, FCC 00-246 (July 20, 2000) ("*CMRS Flexibility Second Report and Order*").

Set forth below is the application of this analysis to the findings of fact and conclusions of the PSC based on the record evidence. The result demonstrates that the PSC correctly determined WRS is a CMRS service for which a CPCN cannot be required.

**A. It is Undisputed that WRS Meets the FCC's Definition of CMRS**

Consolidated concedes that if Western Wireless' WRS is CMRS, state entry regulation is preempted by 47 U.S.C. § 332(c)(3)(A), and the PSC's *Order* and *Order on Remand* should be affirmed.<sup>21</sup> Consolidated's entire argument on whether WRS falls within the definition of CMRS is based on the Act's definition of a mobile station as a unit that can operate while in motion and which ordinarily does move.<sup>22</sup> Consolidated fails to recognize that the FCC (the implementing agency) has determined that a cellular service provided through dual-use equipment – equipment that can be operated in a fixed *or* a mobile capacity – meets the definition of CMRS.<sup>23</sup> This interpretation was codified in FCC Rule 47 C.F.R. § 22.99, which defines a “mobile station” as “one or more transmitters that are capable of operation while in motion.”<sup>24</sup> This rule is binding on the PSC and this Court,<sup>25</sup> and cannot be challenged by Consolidated in this proceeding because the federal Circuit Courts of Appeal have *exclusive* jurisdiction to review FCC rules and orders implementing the federal Communications Act.<sup>26</sup>

---

<sup>21</sup> *Appellant's January 2001 Brief* at p. 7.

<sup>22</sup> *Id.* at p. 8.

<sup>23</sup> *CMRS Second Report and Order* at ¶ 38.

<sup>24</sup> The PSC's *Order* discussed this at page 10.

<sup>25</sup> *Elizabeth Blackwell Health Ctr. For Women v. Knoll*, 61 F.3d 170, 181-82 (3d Cir. 1995) (citing, *inter alia*, *Chevron U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 844-45 (1984)).

<sup>26</sup> 28 U.S.C. § 2342(1) (federal court of appeals has exclusive jurisdiction to set aside or determine the validity of all final orders of FCC).

When the PSC's *Order* is viewed in light of the FCC's interpretation of what constitutes CMRS, the inquiry becomes academic. It is undisputed that WRS utilizes equipment that is capable of operating while moving, and the PSC's *Order* included such a finding.<sup>27</sup> Because the WRS unit meets the FCC's definition of a "mobile station," it therefore meets the definition of CMRS.<sup>28</sup> As CMRS, the service is not subject to state entry regulation in accordance with 47 U.S.C. § 332(c)(3)(A). This was the analysis done by the PSC in its *Order* when it initially concluded that WRS has "mobile capabilities" and is therefore a mobile service under federal law.<sup>29</sup>

Consolidated does not argue that the PSC's determination is inconsistent with the FCC's definition of a "mobile station." The most that Consolidated does is to suggest that certain unidentified FCC rules may overreach the FCC's authority.<sup>30</sup> As set forth above, however, the FCC's Rules are binding until *lawfully* challenged, which must be done in the federal Circuit Courts of Appeal. The conclusion is inescapable – the PSC correctly applied the FCC's binding interpretation of the Act to the undisputed facts, and properly determined the WRS unit has mobile capabilities and is therefore regulated as CMRS. Accordingly, the PSC's *Order* and *Order on Remand* should be affirmed by this Court.

---

<sup>27</sup> *Order* at p. 10, ¶ 33 ("Battery power provides mobility that allows customers to operate wire-line telephones in a cellular fashion from a vehicle, other building, or outdoors.")

<sup>28</sup> *CMRS Flexibility Second Report and Order* at ¶ 38.

<sup>29</sup> *Order* at p. 11.

<sup>30</sup> *Appellant's January 2000 Brief* at p. 12.

## B. FCC Regulation of Solely Fixed Services

As the PSC recognized, further inquiry would be necessary if it had determined that WRS were a “solely fixed service” offered over the same spectrum as a CMRS offering.<sup>31</sup> Under the FCC’s Orders, there are two types of solely fixed services: 1) those offered on an ancillary or auxiliary basis, and 2) those offered on a co-primary basis.<sup>32</sup> In the event PSC did not find WRS to be a mobile service, Western Wireless made a record to support a decision that WRS was provided as “ancillary or auxiliary” to its conventional mobile cellular service. Western Wireless demonstrated that calls to and from a WRS unit use the same network facilities as those to and from a smaller handset. Tr. at page 29. Western Wireless also showed that WRS calls amounted to an extremely small percentage of all calls on its network -- Western Wireless has approximately 45 WRS customers and 100,000 conventional mobile customers in North Dakota. Tr. at pages 27-28; Tr. 2 at page 34.

Western Wireless asserts that this evidence would have (if necessary) supported a finding that WRS was ancillary to, rather than co-primary with, its conventional cellular service. The distinction would have been important if the PSC had decided WRS was a solely fixed service, because under FCC rules, a fixed service that is *ancillary* to a mobile service is still regulated as CMRS.<sup>33</sup> A fixed service that is offered on a *co-primary* basis, as discussed below, is not necessarily regulated as CMRS. Nevertheless, the PSC found WRS to be CMRS because of the dual-use equipment, there was no need for the PSC to reach any other issue. Because WRS is

---

<sup>31</sup> Order at p. 11, ¶¶ 36-37.

<sup>32</sup> See *Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, FCC 96-283, *First Report and Order and Further Notice of Proposed Rule Making*, ¶ 48 (rel. Aug. 1, 1996) (“CMRS Flexibility Order”).

<sup>33</sup> CMRS Second Report and Order at ¶ 36.

not a solely fixed service, the distinction between ancillary and co-primary is of no legal effect and the PSC did not need to reach the issue.

Finally, even if the PSC had determined that WRS was a solely fixed service offered on a co-primary basis with conventional mobile service, that would still not allow the PSC to require a CPCN on the provision of WRS. In the FCC's recent *CMRS Flexibility Second Report and Order*, the FCC declined to presume that all fixed, co-primary services would be regulated as CMRS, but it stated clearly that the FCC would decide the regulatory treatment of such services on a case-by-case basis.<sup>34</sup> As a result, any PSC finding that WRS was a solely fixed service provided on a co-primary basis would have only allowed the PSC (or Consolidated) to seek FCC guidance as to how the service would be regulated.<sup>35</sup>

Western Wireless has explained the regulatory scheme for solely fixed cellular services in this brief not because the Court needs to reach the issue, but because an understanding of the entire regulatory framework shows clearly the fallacy of Consolidated's legal position. For example, Consolidated recognizes the *CMRS Flexibility Second Report and Order* applies only to solely fixed services, but then claims "what this means is that WRS . . . is before this Court on its own facts without any presumption that it is mobile."<sup>36</sup> This is unquestionably an incorrect application of the FCC's order, and ignores the PSC's finding that WRS is not a solely-fixed service.<sup>37</sup> Whether a service is mobile has been decided long before the regulation of fixed, co-primary services needs to be considered.

---

<sup>34</sup> *CMRS Flexibility Second Report and Order* at ¶¶ 1, 8.

<sup>35</sup> *Id.* at ¶ 8.

<sup>36</sup> *Appellant's January 2001 Brief* at p. 10.

<sup>37</sup> *Order*, at p. 11, ¶ 37.



The Court should recognize (as the PSC did) the distinction among cellular services provided with dual-use equipment, fixed cellular service provided as ancillary to a mobile service, and fixed cellular services offered on a co-primary basis. Because it is undisputed that WRS is a mobile service under FCC Rules, and there is no branch of the decision tree that allows the PSC or the Court to grant the relief requested by Consolidated, PSC's *Order* and *Order on Remand* should be affirmed.

### **CONCLUSION**

Consolidated has spent nearly two years seeking the imposition of entry requirements on the WRS provided by Western Wireless. Congress, the FCC, the PSC agree such requirements do not apply. The Court should affirm the *Order* and *Order on Remand* consistent with governing law and standards of review, and should confirm that WRS is a commercial mobile radio service under 47 U.S.C. § 332(c)(3)(A).